REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.197 OF 2013

BETWEEN

PRISCILLA MWARA KIMANI ……………………………………..…1ST PETITIONER

LUCY WATURI KIMANI ………………………..……….……………2ND PETITIONER

ESTHER GATHONI GICIMU……………..…………………………...3RD PETITIONER

AND

THE ATTORNEY GENERAL…………………………………………...RESPONDENT

JUDGMENT

1. In their Petition dated 15th April, 2013, supported by their respective affidavits sworn by them on the same date, the Petitioners describe themselves as female adults of sound mind and have instituted the present proceedings against the Attorney General of the Republic of Kenya as the legal representative of the Government in civil proceedings, alleging various violations of their constitutional rights as a result of events that occurred sometime in 1992.

2. It is their case in the above regard that their fundamental rights and freedoms under **Articles 25 (a)** and **29 (a), (c) (d)** and **(f)** of the **Constitution** were contravened and grossly violated by Police officers, General Service Unit Officers and other Kenyan Government servants, agents, employees and institutions on diverse dates and times from 3rd March 1992 up to 19th January, 1993.

The Petitioners' Case

3. It was their case in the above regard that on 3rd March, 1992, while at Uhuru Park, Freedom Corner, in a peaceful demonstration for the release of their son and brother, James H. Gitau Mwara, (their advocate in the present proceedings) they were inhumanely and brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by Police officers and General Service Unit officers. That on the same day at 9: 45 pm, while still at Freedom Corner, in a tent, fasting for the release of the said Mwara and 53 other political prisoners, they were arrested by over 100 Police Officers and General Service Unit officers and bundled into a police vehicle, (the 'Black Maria') and taken to their respective rural homes in Kiambu County.

4. They averred that the brutality and atrocities they and other women and supporters of the campaign for the release of political prisoners were subjected to by the Kenya Police Force and

the General Service Unit officers was not justified because on 28th February 1992 they had visited the office of the then Attorney General and presented him with a Petition addressed to the Government for the release of all political prisoners who had been jailed for political offences of treason, sedition or belonging to unlawful organizations during the dictatorial KANU one party regime because political pluralism had been re-introduced. That their Petition was received and the attack on them thereafter was uncalled for.

5. The Petitioners further also contended that they and other women at the Freedom Corner on 28th February, 1st March and 2nd March, 1992 had no weapons and the only possessions they had were their clothes, blankets, water, Bibles, Hymnbooks and a tent which had been donated to them by well-wishers among them Prof. Wangari Maathai who in addition gave them moral support, food, clothing and water while they waited for the Government, through the AG, to respond to their Petition.

6. They alleged that as peaceful as they were, the sudden and intense brutality that was unleashed on them on 3rd March, 1992 by the police officers took them by surprise. That they were in fact attacked by over 100 officers with tear gas, batons, and guns while unarmed which left them badly injured and some of them, like Prof. Maathai, were taken to various hospitals, unconscious. In this regard, their case was further that the brutal attack was perpetrated on 3rd March, 1992 between 4 pm to 9.45 pm, and using the cover of darkness, 50 police women raided the tents where the women and men were hurdled, arrested them and bundled the women into police vans before dispersing them to various police stations in Nairobi and then deported them back to their home districts.

7. In addition, that the brutal breakup of their fasting by the officers was an exercise in futility because after one to five days in their rural homes, they went back to Nairobi and began a peaceful campaign and hunger strike afresh at the All Saints Cathedral Church vowing that the brutal officers could as well kill them in solidarity rather than give up their crusade. In this regard, they claimed that they were hosted and camped in the bunker at the All Saints Cathedral from 4th March, 1992 to 19th January, 1993 when all the political prisoners were released. They asserted that all this time, the officers continued to attack them while at the Cathedral and inflicted various injuries on them.

8. For the above reasons, the Petitioners pray for the following orders:

"a) A declaration that the three Petitioners' fundamental rights and freedoms were each contravened and grossly violated by the Respondent's Kenya Police Officers and General Service Unit Officers who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and time on 3rd March, 1992 up to 19th January, 1993. (sic)

b) A declaration that the three Petitioners are each entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms under Article 23 (3) of the Constitution, 2010.

(c) General damages, exemplary and moral damages for torture for each Petitioner.

(d) Any further orders, writs, directions, as this Honourable Court may consider appropriate.

(e) Costs of the suit, and interest."

The Respondent's Case

9. Through a Replying Affidavit sworn on his behalf on 22nd May, 2014, by Philip Ndolo, the Deputy Director of Operations in the Kenya Police Service, the Attorney General opposed the present Petition.

10. Mr. Ndolo, while denying the allegations by the Petitioners, deponed that the said allegations are misconceived, unsubstantiated, and bad in law thereby putting the Petitioners to strict proof thereof.

11. He further deponed that the **Constitution** does not apply retrogressively, thus the Petitioners can only rely on rights under the **Repealed Constitution**. That in any event, the Petitioners were never in police custody and the Kenya Police Service is a stranger to their averments and they did not in any event disclose the names and identities of the police officers who allegedly contravened their rights. Further, that the allegations that they were kicked and beaten do not meet the threshold of the definition of torture pursuant to **Section 74** of the **Repealed Constitution** as well as under the **1984 Convention against Torture**.

12. Lastly, he deponed that the Attorney General is highly prejudiced in defending the Petition given that the alleged cause of action took place over twenty two years before the Petitioners filed the present matter and that old newspaper articles are not admissible neither are they conclusive evidence in a Court of law. In any event that the Petition does not disclose any cause of action against the Attorney General and it should be dismissed with costs.

The Parties Submissions

For the Petitioners

13. The Petitioners, in their Written Submissions dated 27th July, 2015, argued that a number of their rights under the **Constitution 2010** were infringed including the rights under **Section 74** of the **Repealed Constitution**, which has been transited and is preserved in **Articles 25** and **29** of the **Constitution, 2010**. Their submission in that regard was that whereas the Police and General Service Unit officers were entitled to arrest them on suspicion of committing a cognizable criminal offense, they had no legal or statutory power to unleash violence on them, throw tear gas at them, brutalize or batter them with boots, batons, slaps, rubber whips, kicks and blows all over their bodies. These actions, they argued, amounted to a deprivation of their fundamental rights and freedoms arbitrarily or without just cause under **Article 29 (a) (c), (d)**, and **(f)** of the **Constitution**, which was formerly **Section 74** of the **Repealed Constitution**. Further, that whereas the police officers had powers to arrest and charge them before a competent Court as is provided in **Article 49** of the **Constitution**, they had no lawful, legal or statutory power to deprive them of and violate their freedom and security.

14. According to the Petitioners, torture was and is outlawed under the **Constitution, Article 7** of the **International Covenant on Civil and Political Rights (ICCPR)** and the **Convention Against Torture** and although, the Repealed and the Current Constitutions do not give a definition of the term **"torture"**, a plain meaning of the term must be sought from a dictionary and domesticated Human Rights Statutes, Human Rights Instruments and Human Rights Conventions which have proffered the definition of the term. In this regard, they submitted that they have proved their case on a balance of probabilities and they are entitled to the five declaratory orders set out above and monetary compensation as general damages for torture, exemplary damages to punish the Respondent for its agents' unconstitutional conduct and costs of their Petition as prayed.

15. On the question of transnational justice, while defining transnational justice as a judicial process where a period of constitutional transition from a past authoritarian system characterized by a bad constitutional system and victims of past human rights abuses are facilitated to get reparation, redress and compensation, it was their submission that the issues of redress for violation of the fundamental rights and freedoms which are also human rights fall under the doctrine of transnational justice where historical injustices are redressed through this Court.

16. They thus contended that **Article 20** of the **Constitution** mandates this Court to adopt an open-door policy to human rights litigation and not the previous gate-keeper policy where human rights litigation was checked by a narrow interpretation that favours the perpetrators or the State while

these were liable party. That **Article 22** of the **Constitution** refers to all past human rights violations and fundamental rights and freedoms hence violations in 1992 and 1993 can still be filed by litigants; and that the door for transitional justice and redress of historical injustice was actually opened on 27th August, 2010 under the transitional justice clause in the Bill of Rights itself. That transnational justice also ensures that the wounds of the victims of injustice are healed through legal redress; the public officers in future inevitability avoid repeat of the human rights abuses of the past and that there is hope for a peaceful future respect for human rights and the Rule of Law.

17. The Petitioners also expressed the view that the **Constitution, 2010** and even the **Repealed Constitution,** do not limit the time for filing constitutional references and human rights cases founded on violation of fundamental rights and freedoms; and that this Court and the Court of Appeal have in over 100 torture cases ruled that there is no limitation period envisaged in the Repealed and the current Constitutions and, in international human rights law and conventions and all human rights instruments which are the basis of the present Petition. In this regard, their argument was further that if there was any strong intention to limit the period for litigation over fundamental rights and freedoms, the drafters of the Constitution at Bomas of Kenya as well as Kenyan citizens during the public participation before the 2010 Referendum could have simply and expressly provided for a limitation period and also expressly excluded past human rights violations in the current Constitution.

18. Lastly, they submitted that their evidence has not been rebutted hence they are entitled to the prayers in their Petition and that the Court should be guided by the decision of the Court of Appeal in **Nairobi, Civil Appeal No.86 of 2013, Koigi Wa Wamwere vs The Attorney General**, in determining the quantum of damages to award them.

<u>For the Respondent</u>

19. The Attorney General on his part, through his Written Submissions dated 7th August, 2015, submitted that the Petitioners' allegations are baseless, obnoxious and vexatious and are borne out of malice, opportunism and herd mentality. That the Petitioners have not proved their case on a balance of probabilities as no medical notes have been tendered as evidence and that it is difficult to comprehend how any of them survived the aforementioned torture and/or brutality from the police officers from 3rd March, 1992 until 19th January, 1993, a period of close to one year.

20. The Attorney General also took the position that the lack of the aforesaid evidence is a strong indicator that the Petitioners' testimonies must be subjected to legal scrutiny so that they prove their assertions on a balance of probabilities That in any event and in the alternative, they were never tortured and the police officers only did their duty to the State by dispersing unruly crowds and the same cannot amount to torture since it is the duty of the police to maintain law and order at all times and demonstrations are dispersed every other day in Kenya and such demonstrators do not go to court alleging that the act of dispersing them amounted to torture.

21. While relying on **Lt Col. Peter Ngari Kagume and Others vs Attorney General, Petition No.128 of 2006**, the Attorney General asserted that when a Court is faced with a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation. As such he contended that the Petitioners have a duty under **Sections 107** and **109** of the **Evidence Act**, **Cap 80, Laws of Kenya** to prove their allegations on a balance of probabilities which they have failed to do.

22. While placing further reliance on **Maharaj vs Attorney General of Trinidad and Tobago**, **(No 2) PC ([1979] AC 385,** the AG submitted that damages in constitutional matters are not meant to restore a person to the state that they were in before the act complained of, as is the principle in tortuous claims, but to give just satisfaction. Further, that in granting relief, the Court applies the principles that, if there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition, if necessary, to afford

just satisfaction. The Court should also not award exemplary or aggravated damages and that any award should be of no greater sum than that necessary to achieve just satisfaction, and the quantum or award should be moderate and normally on the lower side by comparison to tortuous awards.

23. The Attorney General concluded that the doctrines of equity are still alive in our realm and therefore he who comes to equity must come with clean hands and the Petitioners are not entitled to the prayers sought as they have failed to prove their cases to merit and with full disclosure. That whereas this Court has a constitutional mandate to protect and safeguard the rights and freedoms of individuals, the Petitioners must demonstrate to the satisfaction of the Court that their rights were violated and they have failed to do so.

24. Lastly, that the Kenyan judicial system is an adversarial system where parties to a suit are judged based on the evidence tendered before Court and the Court should not allow itself to be arm twisted by litigants who take opportunity to reap where they did not sow. That therefore the Petition ought to be dismissed.

Determination

25. The key issue for determination in the present matter is whether there has been a violation of the Petitioners' constitutional rights as alleged and the remedies available to them, if any. Before I proceed on to the substantive determination of that matter, I must address my mind to the preliminary issue raised by the Respondent that the present matter is time barred having been brought more than 20 years after the incident complained of. This is an important issue to address in view of the continued submission by the Attorney General in similar cases and to give guidance to parties in the future.

The Doctrine of Limitation of Time in Constitutional Petitions alleging violations of fundamental Rights and Freedoms

26. The wake of the **Constitution 2010**, has witnessed an unprecedented number of suits filed alleging violations of constitutional rights and fundamental freedoms by earlier governing regimes in Kenya. Owing to the transformative nature of the Constitution, individuals have therefore seen an opportunity to institute claims enforcing their rights for past violations. This has also led to the institution of a large number of suits against the Kenyan Government with some suits alleging violations that occurred over 20 years ago being filed. Courts thereby have been confronted with the question of limitation of time in regard to such suits. For instance in **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No.41 of 2014** the learned judge observed that:

"[24] ***Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported, Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.***

[25] ***I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: 'Although there is no limitation period for filling proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim.'***

[26] ***In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim***." (Emphasis added)

27. Further, in **High Court Petition No.306 of 2012 Ochieng' Kenneth K'Ogutu vs Kenyatta University and 2 Others, the judge observed as follows:**

"[35]As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. <u>While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing,</u> there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter."

As regards the effect of such delays, the court noted thus:

"[36]<u>There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable.</u> As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "<u>Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay.</u> In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years."

The Court thereafter concluded that:

"In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods."

28. I also note that in J**oseph Migere Onoo vs Attorney General, Petition No.424 of 2013,** the Court found that the Petition was time barred owing to the fact that it had been filed 27 years after the cause of action had arisen. In that case, the Petitioner had filed suit against the Government of Kenya alleging violations of various constitutional rights, which he averred occurred following his alleged arrest and torture in various places in 1986, when he was a student at Egerton University. In this regard, the Court, while dismissing the Petition made the observation that:

"[39] ***The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence.***

[40] ***In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this***."

29. From the above decisions, while upholding the dissatisfaction by Courts in the filling of such Petitions, the general principle that no limitation of time can be imposed in matters where

violation of rights has been alleged, after a considerable length of time had lapsed since the alleged violations occurred cannot be gainsaid. Further, according to the above authorities, emphasis is placed on the fact that each case must be examined and gauged on its own merits and the question whether the delay is inordinate is therefore left to the discretion of the Court which is to examine each case on its merits. It is also clear that the Courts have long abandoned the notion that in all instances with no exception, there is no limitation of time for filing claims alleging violation of constitutional rights and fundamental freedoms. Of great importance therefore for consideration before Courts is the justification of any such delay.

30. In that regard, I appreciate the holding of the Court in ***Gerald Gichohi and 9 Others vs Attorney General Petition No.487 of 2012*** *where it was* stated that:

"It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners' submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past."

31. In agreeing with the above decision, I also understand that the constitutional spirit is premised on the dictates of transitional Justice which refers to the set of judicial and non-judicial measures that have been implemented by different Countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. This however in my view cannot be a *carte blanche* for raising stale claims after a number of years without a justification for the delay in filing such claims. It is therefore imperative for a Petitioner to demonstrate some justification for such prolonged delays especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I hold so bearing in mind that as early as the year 2003, persons aggrieved by acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms. These include in **Stanley Waweru Kariuki vs Attorney General, Petition 1376 of 2003; Gitari Cyrus Muraguri vs Attorney General, Miscellaneous Case No. 1185 of 2003 (OS); Harun Thungu Wakaba vs Attorney General, Nairobi, Miscellaneous Application 1411 of 2004; Rumba Kinuthia vs Attorney General; Nairobi HCCC 1408 of 2004, Mugo Theuri vs Attorney General, HC Misc. Civil Case No 565 of 2005; David Njuguna Wanyoike vs Attorney General**, **Petition No. 729 of 2006; Oduor Ong'wen and 20 Others vs Attorney General, Petition No. 777 of 2008; Charles Gachathi Mboko vs Attorney General**, **Civil Case No. 833 of 2009 (O.S.); James Omwega Achira vs Attorney General, Petition 242 of 2009; Mwangi Mathenge vs Attorney General, Petition 240 of 2009; and Koigi Wamwere vs Attorney General, Petition 737 of 2009 among many others. The foregoing further indicates that the cases alleging violations by the oppressive regime have been filed from 2003 onwards even before the promulgation of the Constitution of Kenya, 2010 contrary to the assertions by Counsel for the Petitioners.**

32. **Turning back to the present case, based on the material before this Court, no justification has been given pertaining to the inordinate delay in presenting the present matter which was filed on 18th April, 2013 alleging violations that occurred in 1992 and 1993, twenty one years ago. This leaves me with many unanswered questions and I am inclined to agree with the Respondent's contention that the delay is prejudicial in the circumstances, and I am also inclined to agree with the decision in Mombasa Civil Case No. 128 of 1962, Rawal vs Rawal [1990] KLR 275** where the Learned Judge stated thus**:**

"The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."

33. *In that context, it must be borne in mind that this Court cannot aid litigants in failing to uphold and respect the general principles of law, and the* ***Constitution, 2010*** *should not be used as an avenue for circumventing such principles. As the court in* **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited vs Governor Central Bank Of Kenya and 2 Others, Misc Civ Appl 1759 of 2004 also** *observed:*

"***In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitations periods...".***

34. Similarly, the Court in **Charles Gachathi Mboko vs Attorney General, Civil Case No.833 of 2009 (O.S.), warned against the dangers of allowing claims brought long after the fact without explanation. The Court stated as follows:**

"It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim."

35. *Finally, in* **Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743**, Lord Camden LC while applying the doctrine of laches, made the observation that:

'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: "Expedit reipublicae ut sit finis litium', is a maxim that has prevailed in this court at all times, without the help of parliament."

36. In a nutshell, I must state that length of delay is not the issue *per se* but acceptability of the explanation proffered by a party is also an important consideration. The doctrine of laches is based on the maxim that "**Equity aids the vigilant and not those who slumber on their rights**" and "**Delay defeats equity**" and whereas there are cases in other jurisdictions as alleged by the Petitioners pertaining to violations of rights by old regimes such as the Nazis among others, I must remind the Petitioners that each case alleging violation of constitutional rights and fundamental freedoms must be determined on its own merits and in its own circumstances. A blanket acceptance of old and stale claims cannot advance the fair administration of justice.

37. In the present case, I am aware, and it was so pleaded, that the Petitioners are the mother and sisters respectively of their advocate, Gitau Mwara Esq. whose release they were agitating for in 1992. It is also common knowledge that he instituted his own claim against the State many years ago and it is difficult to understand why he did not institute his mother's and his siblings claim at the same time. The present claim was therefore made for less than genuine reasons and I so find.

38. But suppose I am wrong and had gone straight to the evaluation of the evidence that the Petitioners sought to rely on? In that regard, save for the evidence contained in their Affidavits and in oral testimony before this Court, the Petitioners placed substantive reliance on a newspaper article attached to their Petition, as part of their evidence in support of the said Petition. Are newspaper articles admissible as evidence in Petitions alleging violations of rights and fundamental freedoms? I must answer the question in the negative because of the principle that he who alleges must prove and **Section 107** of the **Evidence Act** provides in that regard that:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. ***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person***."

39. **Section 109** of the **Evidence Act** further stipulates that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

40. Further, in **China Wuyi and Co Limited vs Samson K Metto [2014] eKLR, Civil Appeal No 181 of 2009**, it was stated that:

"*The cardinal principle of law that, 'he who alleges must prove' is also well captured in Sections 107 to 109 of the Evidence Act.*"

41. As regards documentary evidence, specifically **Section 35** of the **Evidence Act** is to the effect that:

"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, in production of the original document be admissible as evidence of that fact if the following conditions are satisfied that is to say-

a. ***If the maker of the document either-***

i. ***Had a personal knowledge of the matter dealt with by the statement; or***

ii. ***Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters***"

42. In the above context, I further note that in **Tesco Corporation Ltd vs Bank of Baroda (K) Limited, Civil Case 182 of 2007,** the Court was faced with a similar question on the admissibility of a report contained in a newspaper. The Learned Judge then expressed the view that:

"***The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the applicant is a newspaper report contained in the Daily Nation of 19th November, 2007. The issue here is admissibility of documentary evidence as to the facts in issue.***

The provisions of Section 35 of the Evidence Act are clear on this issue…

Having considered the application in light of the affidavit evidence and submissions by both counsel and the relevant law, I am not persuaded that the newspaper report is covered under the provisions of Section 35 of the Evidence Act."

43. Similarly, in **Kituo Cha Sheria and Another vs Central Bank of Kenya and 8 Others, Petition No 191 of 2011,** consolidated with **Petition No.292 of 2011,** it was noted that:

"[32] ***As correctly pointed out by the Attorney General and the 1st respondent, the petition has its***

basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere vs The A.G and Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.

[33] ***The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a "Share Sale and Purchase Agreement". The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled "De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009".***

[34] ***The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulations procurement***."

44. The foregoing makes it quite clear on the inadmissibility of newspaper articles and cuttings and I do not see any reason to depart from the findings therein. I say so well aware that **Rule 10(3)** of the **Constitution** of Kenya **(Protection of Rights and Fundamental Freedoms)** practice and procedure Rules provides as follows:

"Subject to Rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."

Rules 9 and **10** in my view, do not depart from the requirement that only admissible documents should be the basis of any credible evidence.

45. It is apparent therefore that by dint of the provisions of the **Evidence Act,** reproduced herein above, the Petitioners are under an obligation to prove their case on a balance of probability. In this regard, whereas the Petitioners made various assertions that they were tortured, i.e. that they were subjected to **"inhumane and brutal battery with boots, batons, slaps, rubber whips, kicks and blows all over their bodies; attacks by over 100 Kenya Police Officers and General Service Unit officers"** which they further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993, no material evidence was placed before this Court to corroborate their averments. Perhaps medical records would have sufficed in that regard but none were produced. The length of the alleged torture would certainly have had catastrophic effects on their physical well-being but that allegation was very casually made.

46. Interestingly however, in their oral evidence and during cross-examination, the Petitioners admitted that they did not seek any medical attention despite the aforesaid attacks by over 100 officers for a continuous period of about ten months. They instead referred to people like the late Prof. Wangari Maathai who were injured and taken to hospital. This in itself raises a lot of questions in regard to their assertions. I saw them in Court and I am convinced that those assertions were less than candid if read with their Petition.

47. Based on my reasoning above, I am unable to reach the conclusion that the Petitioners have made out a case for violations of their rights as alleged. I am however certain that they were at Freedom Corner and the All Saints Cathedral on the days they said they were there but proof of torture to the required standard has dealt their claim a death blow. Further, since the Petitioners had set out to agitate for release of political prisoners, which eventually happened, their present claim is certainly driven by financial gain and not a genuine need to redress alleged violations of constitutional rights. I shall say no more.

Conclusion

48. I will repeat what I have stated in other Petitions arising from the events at Freedom corner in 1992 that it is now no longer a matter of debate that since 2002 after the change of political regime in Kenya, hundreds of claims have been filed by genuine victims of historical injustices. The Kenyan Judiciary, admitting its role in shutting out such claims in the past, and in the spirit of transitional justice, opened its doors, relaxed its application of strict rules of evidence and granted appropriate reliefs under both the **Repealed Constitution** and the **Constitution, 2010**. One of the rules evidently relaxed was that of limitation of time. By this judgment, I have stated that whereas limitation of time may not be strictly applied, Parties coming to Court ten (10) year after the opening up of the floodgates of justice must explain themselves and it would therefore be very difficult for this Court to accept at face value claims filed after 2012 without clear and justifiable explanations for the delay.

49. Apparent and increasing abuse of the Court process by parties intent on making money from the State relating to incidents that happened twenty or thirty years ago without proper explanations for the delay in instituting the claims may in fact attract sanction from this Court. Genuine claims will and must however continue receiving the attention of the Courts for years to come but frivolous claims based on real events but with no proof of violations of constitutional rights will be frowned upon. The present Petition falls in the latter category and must be dismissed.

Disposition

50. Without saying more, I hereby dismiss the Petition herein but each party shall bear its own costs.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitau for Petitioners

Mr. Obura for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE